Lee Chiang Boh @ Lee Ching Moo v Lee Nyoke Hin & Anor (Sim Tee Chiang @ Je Chang, third party)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–81 OF 2008
ZAINUN ALI, RAMLY ALI AND KANG HWEE GEE JJCA
18 JUNE 2012

Contract — Sale and purchase of land — Mutul mistake of law — Common mistake — Plaintiff became registered owner of only half undivided share of land — Whether sale and purchase agreement void — Whether plaintiff entitled to make claim for restitutio in integrum — Whether there was total failure of consideration — Damages — Whether plaintiff entitled to compensation by way of damages — Doctrine of severance — Whether second defendant's liability confined to 50% of sale and purchase amount — Contracts Act 1950 ss 22 & 66

Lee Nyoke Hin ('the plaintiff') had purchased a piece of land situated in Selangor ('the land') from Lee Chiang Boh @ Lee Ching Moo ('the first defendant'). Although the sale and purchase agreement ('the SPA') provided that the land was sold to the plaintiff for the consideration sum of RM300,000, the plaintiff claimed that he had paid a further sum of RM285,000 to the first defendant for the purchase of the land. The second defendant was the solicitor acting for the first defendant in the SPA. Subsequently, when the land was acquired by the government the plaintiff discovered that he had only acquired a half undivided share of the land. The plaintiff thus filed an action against the defendants wherein he claimed for restitution of all the monies that he had paid in respect of the sale of the land. It was the plaintiff's case that the contract he had entered into with the first defendant was void pursuant to s 22 of the Contracts Act 1950 ('the Act') and that pursuant to s 66 of the Act all sums received by the first defendant, including the further consideration of RM285,000, should be refunded to him. The plaintiff's claim against the second defendant was based on professional negligence. The plaintiff claimed that the second defendant had failed to conduct a search on the land and/or failed to advise the plaintiff as regards the legal status of the first defendant vis-à-vis the land. In this connection, the first defendant served a notice of contribution or indemnity on the second defendant for failing to advise him and the plaintiff on the status of the land. At the same time the first defendant also issued a third party notice to the third party from whom he had purchased the land seeking contribution should he be held liable to the plaintiff in this suit. The third party in turn issued a fourth party notice to the party (the first fourth party) from whom he had bought the land and the firm of solicitors who had acted for the third party in that SPA (the second fourth party). In his defence the first defendant averred that the plaintiff's claim for full restitution

was unmaintainable because the plaintiff had been registered as the proprietor of the half undivided share of the land. The trial judge found that that the SPA was valid and effective and that the plaintiff had become the registered owner of the half undivided share of the land. As such he held that the plaintiff was not entitled to make the claim for restitutio in integrum. At the same time he found that the plaintiff had to be compensated in damages by the first defendant for getting only a half undivided share of the land. The first and second defendants were thus jointly and severally ordered to pay the plaintiff damages amounting to RM292,000 or half of RM585,000. In addition, the trial judge also ordered the second defendant to fully indemnify the first defendant for the damages to be paid by the latter to the plaintiff; the third party to contribute and indemnify the first defendant to the extent of RM150,000; and the second fourth party to indemnify the third party to the extent of RM110,000. The first and second defendants both appealed separately against this decision of the High Court.

Held, allowing the first defendant's appeal with no order as to costs and ordering the second defendant to pay damages of RM150,000:

(1) The authorities cited in this case supported the contention that equity would not undo a sale of land after conveyance on the grounds of common mistake unless there was a total failure of consideration. In the instant appeal, the plaintiff got his half share of the land and became the registered owner. He had also received his share of the compensation award in respect of the acquisition of the land. Thus, it could not be said that there was a total failure of consideration and the plaintiff's claim for restitution was untenable (see paras 25–26).

(2) The first defendant's liability was placed at 50% of the RM300,000 ie RM150,000 only (see para 45).

(3) As for the second defendant's appeal against the first defendant and the plaintiff, the doctrine of severance would apply to the amount of RM285,000. Since the second defendant had conceded the issue of negligence, its liability was confined to 50% of the sale and purchase amount ie RM300,000. Thus the second defendant was ordered to pay RM150,000 (see paras 42–44).

[Bahasa Malaysia summary

Lee Nyoke Hin ('plaintif') telah membeli sebidang tanah yang terletak di Selangor ('tanah') daripada Lee Chiang Boh @ Lee Ching Moo ('defendan pertama'). Walaupun perjanjian jual beli ('PJB') memperuntukkan bahawa tanah tersebut dijual kepada plaintif dengan balasan berjumlah RM300,000, plaintif mendakwa bahawa dia telah membayar jumlah tambahan sebanyak RM285,000 kepada defendan pertama bagi pembelian tanah tersebut. Defendan kedua merupakan peguamcara yang bertindak bagi pihak defendan

A pertama dalam PJB. Selepas itu, apabila tanah tersebut dibeli oleh kerajaan, plaintif mendapati bahawa dia hanya memperoleh separuh daripada bahagian tanah yang tidak dibahagikan. Plaintif dengan itu memfailkan tindakan terhadap defendan-defendan di mana dia menuntut pengembalian kesemua wang yang telah dibayarnya bagi jualan tanah tersebut. Adalah menjadi kes
B plaintif bahawa kontrak yang telah dimeterainya dengan defendan pertama adalah tidak sah menurut s 22 Akta Kontrak 1950 ('Akta') dan menurut s 66 Akta, kesemua jumlah wang yang diterima oleh defendan pertama, termasuk balasan tambahan sebanyak RM285,000, harus dikembalikan kepadanya.
C Tuntutan plaintif terhadap defendan kedua adalah berdasarkan kecuaian profesional. Plaintif mendakwa bahawa defendan kedua telah gagal menjalankan carian ke atas tanah dan/atau gagal menasihati plaintif berkenaan status defendan pertama di sisi undang-undang berkenaan tanah tersebut. Sehubungan itu, defendan pertama telah mengeluarkan notis sumbangan atau
D tanggung rugi kepada defendan kedua kerana gagal memberikan nasihat kepadanya dan plaintif mengenai status tanah tersebut. Pada masa yang sama, defendan pertama juga telah mengeluarkan notis pihak ketiga kepada pihak ketiga yang daripadanya dia telah membeli tanah untuk mendapatkan sumbangan sekiranya dia bertanggungan kepada plaintif dalam guaman ini.
E Pihak ketiga pula mengeluarkan notis pihak keempat kepada pihak (pihak pertama keempat) yang daripadanya dia telah membeli tanah dan firma guaman yang telah bertindak bagi pihak ketiga dalam PJB tersebut (pihak kedua keempat). Dalam pembelaannya, defendan pertama menegaskan
F bahawa tuntutan plaintif untuk pengembalian penuh tidak boleh dikekalkan kerana plaintif telah didaftarkan sebagai pemilik ke atas separuh daripada bahagian tanah yang tidak dibahagikan. Hakim bicara mendapati bahawa PJB adalah sah dan berkuatkuasa dan bahawa plaintif telah menjadi pemilik berdaftar separuh daripada bahagian tanah yang tidak dibahagikan tersebut.
G Oleh itu, beliau berpendapat bahawa plaintif tidak berhak membuat tuntutan *restitutio in integrum*. Pada masa yang sama, beliau juga mendapati bahawa plaintif harus diberi pampasan ganti rugi oleh defendan pertama kerana hanya mendapat separuh bahagian tanah yang tidak dibahagikan. Defendan pertama dan kedua adalah dengan itu secara bersesama dan berasingan diperintahkan
H untuk membayar ganti rugi kepada plaintif berjumlah RM292,000 atau separuh daripada RM585,000. Di samping itu, hakim bicara juga memerintahkan defendan kedua agar menanggung rugi defendan pertama sepenuhnya bagi ganti rugi yang perlu dibayar oleh defendan pertama kepada
I plaintif; pihak ketiga agar menyumbang dan membayar ganti rugi defendan pertama setakat RM150,000; dan pihak kedua keempat agar membayar ganti rugi kepada pihak ketiga setakat RM110,000. Defendan pertama dan kedua kedua-duanya secara berasingan merayu terhadap keputusan ini di Mahkamah Tinggi.

Diputuskan, membenarkan rayuan defendan pertama tanpa perintah terhadap kos dan memerintahkan defendan kedua membayar ganti rugi sebanyak RM150,000:

(1) Nas-nas yang dirujuk dalam kes ini menyokong hujahan bahawa ekuiti tidak akan membatalkan penjualan tanah selepas pemindahhakkan atas alasan kesilapan bersama melainkan jika terdapat kegagalan memberi balasan. Dalam rayuan ini, plaintif memperoleh separuh daripada bahagiannya ke atas tanah tersebut dan menjadi pemilik berdaftar. Dia juga telah menerima bahagian pampasan award bagi pengambilalihan tanah. Oleh itu, tidak boleh dikatakan bahawa terdapat kegagalan jumlah balasan dan tuntutan plaintif untuk pengembalian tidak dapat dikekalkan (lihat perenggan 25–26).

(2) Liabiliti defendan pertama telah ditetapkan pada 50% daripada RM300,000 iaitu RM150,000 sahaja (lihat perenggan 45).

(3) Bagi rayuan defendan kedua terhadap defendan pertama dan plaintif, doktrin pemisahan terpakai kepada jumlah RM285,000. Oleh kerana defendan kedua telah mengakui isu kecuaian, liabilitinya terhad kepada 50% daripada jumlah jualan dan pembelian iaitu RM300,000. Oleh itu, defendan kedua telah diarahkan untuk membayar RM150,000 (lihat perenggan 42–44).]

Notes

For a case on mutual mistake of law, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 5768.

Cases referred to

Alsagoff v Robin & Ors [1965] 1 MLJ 56 (refd)
Lim Kar Bee v Duafortis Properties (M) Sdn Bhd [1992] 2 MLJ 281, SC (refd)
Svanosio v McNamara (1956) 96 CLR 186, HC (refd)
Wong Swee Chan v Teh Ah Yong [1981] 2 MLJ 331 (refd)

Legislation referred to

Contracts Act 1950 ss 21, 22, 24, 66

Appeal from: Civil Suit No MT3–22–1161 of 1998 (High Court, Shah Alam)

HY Lee (HY Lee & Co) for the appellant.
James Culaz (Andrew Khoo with him) (Culaz & Assoc, Khoo & Sidhu & Nordin Torji & PTS) for the respondent.

Zainun Ali JCA (now FCJ) (delivering judgment of the court):

[1] In these two appeals ie B-02–18 of 2008 and 02–81 of 2008, it is apparent that there are overlapping issues, involving several parties involved in layers of transactions.

[2] The appeals concern the purchase of a piece of land ('the land') held under EMR 7296 Lot 5567 Mukim Kajang Daerah Ulu Langat Negeri Selangor Darul Ehsan.

[3] The first respondent ('Lee Nyoke Hin') was the plaintiff, whilst the appellant ('Lee Chiang Boh @ Lee Ching Moo') was the first defendant and the second respondent ('Ling and Theng Book') was the second defendant in the suit below.

[4] For ease of reference, the parties shall be referred to as they appear in the court below.

FACTUAL BACKGROUND

[5] As most of the important facts are not disputed, the facts can briefly be stated as follows.

[6] The plaintiff ('the first respondent') purchased the said land from the first defendant ('the appellant') for a consideration sum of RM300,000 by a sale and purchase agreement dated 10 June 1996.

[7] The plaintiff averred that he had paid a further sum of RM285,000 to the first defendant for the purchase of the said land. The transfer was duly registered at the land office.

[8] The second defendant was the solicitor acting for the plaintiff in the said purchase.

[9] Prior to the above transaction with the plaintiff the first defendant bought the said land from a third party ('Sim Tee Chiang @ Je Chang') vide a sale and purchase agreement dated 30 April 1995 for a consideration sum of RM300,000.

[10] The second defendant acted for the first defendant in this transaction. The first defendant was then duly registered as proprietor of the said land.

[11] The above named third party had previously bought the said land from the first fourth party ('Syarikat Sivam') pursuant to a sale and purchase agreement dated 13 June 1994 for a consideration sum of RM220,000.

[12] The second fourth party was the firm of solicitors which acted for the third party in the said sale and purchase transaction.

[13] It is undisputed by all parties concerned that they were unaware that they had actually sold and bought only the half undivided share of the said land. The other half undivided share belongs to other parties.

[14] Meanwhile the land was acquired by the government and the plaintiff was compensated with a sum of RM215,000 for the half undivided share of the said land.

[15] Through his amended statement of claim, the plaintiff now claims for restitution of all the monies (*restitutio in integrum*) that have been paid in respect of the sale of what was supposed to be for the whole of the said land together with interests and costs from the first and second defendants.

[16] In simple terms, the plaintiff is claiming that the monies he had paid for the sale and purchase agreement is to be returned to him and the contract be declared null and void.

[17] Thus against the first defendant, the plaintiff's case is that there was a mutual mistake since the parties were not in *consensus ad idem* since what was transacted was not the whole land but only a half undivided share thereof.

[18] The plaintiff's case is that consequent to the above, the contract between the plaintiff and first defendant is void pursuant to s 21 of the Contracts Act 1950 and that pursuant to s 66 of the said Act, all sums received by the first defendant must be refunded. The plaintiff contended that the refunded sum should include the RM285,000 paid by the plaintiff to the first defendant as 'further consideration' for the purchase of the said land.

[19] The plaintiff's claim against the second defendant is based on professional negligence, as solicitors acting for and on behalf of the plaintiff, in that the second defendant had failed to conduct a search on the said land and/or failed to advise the plaintiff as regards the legal status of the first defendant vis a vis the said land.

[20] In this connection, the first defendant served a notice of contribution or indemnity on the second defendant for failing to advise both the plaintiff and himself on the land's status. The first defendant also issued a third party notice to the third party seeking indemnity and contribution should the first defendant be held liable to the plaintiff in this suit.

[21] As is wont in this type of cases, the third party consequentially issued a fourth party notice to the first and second fourth parties, seeking indemnity and contribution in the event the first defendant was found to be liable in the suit.

THE PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT

[22] In view of the alleged mutual mistake as to the property transacted, it is the plaintiff's case that the plaintiff had actually contracted to buy the whole land, but had ended up with only half undivided share. Thus there is total failure of consideration.

[23] The first defendant's response was that since the sale and purchase agreement had been executed and the plaintiff had already been registered as the proprietor of half undivided share of the said land, the order of full restitution in the circumstances is unmaintainable.

[24] See (*Wong Swee Chan v Teh Ah Yong* [1981] 2 MLJ 331; *Alsagoff v Robin & Ors* [1965] 1 MLJ 56).

[25] The above authorities support the contention that equity will not undo a sale of land after conveyance on the ground of common mistake unless there is a total failure of consideration, which is not the case in the instant appeal, since the plaintiff got his 1/2 share of the said land and became the registered owner.

[26] Thus in our view, the plaintiff's claim for restitution is untenable. As other authorities have also made clear, equity will not adversely affect a sale of land after conveyance unless there has been found or there is such a discrepancy between what has been sold and what has been represented, such that there is a total failure of consideration, or what amounts, to a total failure of consideration (see *Svanosio v McNamara* (1956) 96 CLR 186).

[27] In the present appeal, the plaintiff has not pleaded fraud. Can it then be said there is total failure of consideration? A

[28] The plaintiff had his 1/2 undivided share in the said land conveyed and transferred to himself and he is the registered owner of the same. He had also received his share of the compensation award given by the land office in respect of acquisition of the said land. Thus the conveyance of the said land remains valid and effective. Consequently the sale and purchase agreement between the plaintiff and first defendant remains intact. B

[29] The learned High Court judge found that the total consideration sum was RM585,000. In view of a payment of a further consideration sum of RM285,000. This was paid outside the scope of the sale and purchase agreement. It was purportedly part of an arrangement agreed between the plaintiff and the first defendant, that though the said sum is related to the sale and purchase of the land, it was not meant to be explicitly manifested in the formal written agreement. C D

[30] The first defendant in his testimony alluded to the fact that the purpose of such an arrangement was to evade the attention of the income tax department (to avoid paying the real property gains tax on the plaintiff's part). E

[31] Whatever it was, it was the first defendant's case that the whole transaction was tainted with illegality and/or against public policy and so the sale and purchase agreement is voided under s 24 of the Contracts Act, whereby the court should not lend its support (see *Lim Kar Bee v Duafortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281). F

IN THE HIGH COURT

[32] The learned trial judge made this finding: on the first issue as to whether the sale and purchase agreement between the plaintiff and first defendant is void under s 21 of the Contract Act. The learned trial judge found that there is no total failure of consideration in this case as the plaintiff did become the registered owner of the 1/2 undivided share of the land, which makes the conveyance thereof valid and effective. G H I

[33] As for the second issue, in respect of the payment of the sum of RM285,000 by the plaintiff to the first defendant, the learned trail judge found that the plaintiff had proven that he said sum was paid to the first defendant as a 'further consideration' sum; thus making the total consideration sum to be RM585,000. The judge also found that the sum of RM285,000 was paid beyond and outside the scope of the sale and purchase agreement.

[34] Thus having found that the sale and purchase agreement was valid and effective, the judge therefore found that the plaintiff is not entitled to make the claim for *restitutio in intergrum*.

[35] The learned judge found however, that since the plaintiff contracted to purchase the whole land but was shortchanged so to speak, in getting only 1/2 undivided share, the plaintiff has to be compensated by the first defendant by way of damages. In the learned judge's view, the most appropriate measure of damages for the plaintiff should be what the plaintiff ought to have paid for the 1/2 undivided share of the said land. Under the sale and purchase agreement, the purchase price is RM300,000 for the whole land.

[36] Therefore the learned judge said that the plaintiff's loss was RM150,000. The learned judge found that the plaintiff's entitlement to damages is equivalent to half of the money he had paid in the sale and purchase agreement and this amount is granted in the interest of justice.

[37] As for the first defendant's claim for contribution from the second defendant, the learned judge found that evidence showed that the second defendant was involved in preparing both the sale and purchase agreement between the plaintiff and the first defendant and the sale and purchase agreement between the first defendant and third party.

[38] In the circumstances, the first defendant's claim for full indemnity against the second defendant should be allowed.

[39] The trial judge also found that the first defendant has the right to claim contribution and indemnity from the third party.

[40] As for the third party's claim against the second fourth party, the learned judge said that its position would be similar to that of the second defendant in

that, as solicitor for the third party in preparing the sale and purchase agreement with the first fourth party, it owed a duty of care to properly advise the third party on the actual ownership of the said land.

[41] Thus the High Court judge made the following orders:

(a) the first and second defendants jointly and severally do pay the plaintiff damages amounting to the sum of RM292,500 (being half of the sum of RM585,000 that the plaintiff had paid to the first defendant and half of the legal fees);

(b) the second defendant to fully indemnify the first defendant on the amount of damages paid by the first defendant to the plaintiff;

(c) the third party to contribute and indemnify the first defendant to the extent of RM150,000; and

(d) the second fourth party to contribute and indemnify the third part to the extent of RM110,000.

OUR FINDINGS

[42] As regards Appeal No 8 (B-02–81 of 2008) where the second defendant was the appellant and the plaintiff (Lee Nyoke Hin) was the first respondent and the first defendant (Lee Chiang Bok @ Lee Ching Moo) was the second respondent, we found that the doctrine of severance applies as regards the amount of RM285,000.

[43] We found that since the second defendant had conceded the issue of negligence, the second defendant's liability is confined to 50% only of the sale and purchase amount ie RM300,000.

[44] Thus the second defendant is ordered to pay RM150,000 only.

[45] As regards Appeal No 9 (B-02–81 of 2008) based on the above reason, the first defendant's liability is placed at 50% of the RM300,000 (ie RM150,000) only.

[46] Thus we allow the appeal with no order as to costs.

[47] The deposit is to be refunded to the respective appellants.

A *First defendant's appeal allowed with no order as to costs and second defendant ordered to pay damages of RM150,000.*

Reported by Kohila Nesan

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